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**Datasheet for the decision
of 2 September 2021**

Case Number: T 2733/17 - 3.2.06

Application Number: 05854241.6

Publication Number: 1833447

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B65D5/42, A61F13/84

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE HAVING A FUNCTIONAL ENHANCEMENT INDICATOR

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:

RPBA 2020 Art. 13(2)

EPC Art. 56

Keyword:

Inventive step - (yes)

Late-filed objections - circumstances of appeal case justify
admittance (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 2733/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 2 September 2021

Appellant: The Procter & Gamble Company
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 October 2017 concerning maintenance of the
European Patent No. 1833447 in amended form.**

Composition of the Board:

Chairman M. Hannam
Members: P. Cipriano
E. Kossonakou

Summary of Facts and Submissions

I. In its interlocutory decision dated 23 October 2017 the opposition division found that European patent No. 1 833 447 in an amended form met the requirements of the EPC.

II. This decision was appealed by both the opponent and patentee.

III. The patentee requested that the decision under appeal be set aside and the patent maintained on the basis of the main request underlying the decision or, in the alternative, that the patent be maintained according to one of the first or second auxiliary requests.

The opponent requested that the decision under appeal be set aside and the patent be revoked.

With its reply to the grounds of appeal of the opponent, the patentee further filed third, fourth and fifth auxiliary requests.

IV. The following documents, referred to by the opponent in its grounds of appeal, are relevant to the present decision:

D2 US 4 673 403

D4 US 2003/0114809 A1

D6 JP 2003-052743 A and its translation D6c

D9 WO 97/24096 A1

V. The Board issued a summons to oral proceedings followed by a communication containing its provisional opinion, in which it indicated *inter alia* that, as far as the fifth auxiliary request was concerned, the Board had

doubts whether a change to an alternative type of mark in the article would involve an inventive step.

VI. Oral proceedings were held before the Board on 2 September 2021, during which the proprietor withdrew its appeal as well as its third and fourth auxiliary requests, the fifth auxiliary request thus becoming its main request.

The final requests of the parties were as follows:

The patentee requested maintenance of the patent on the basis of the single claim of the fifth auxiliary request.

The opponent requested that the decision under appeal be set aside and the European patent No. 1 833 447 be revoked.

VII. Claim 1 of the fifth auxiliary request reads as follows:

"A feminine hygiene article (10) having a bodyfacing surface, a first end region (12) and a second end region (14), said feminine hygiene article (10) being for placement in an undergarment having a crotch portion bounded on opposite sides by portions of curved leg openings, said feminine hygiene article (10) comprising at least one functional enhancement indicator (34) visible from said body-facing surface, said functional enhancement indicator (34) corresponding to at least one functionally-enhanced portion of said feminine hygiene article (10), wherein said functional enhancement indicator (34) is nearer said first end than said second end of said feminine hygiene article (10) and wherein said functional enhancement indicator (34) is chosen from the group

consisting of printed marks, colored marks, and combinations thereof,
wherein said article is a urinary incontinence pad (10) having a shape defining an outer periphery, a topsheet (26) joined about at least a portion of said outer periphery to a backsheet (22) with an absorbent core (20) disposed between said topsheet (26) and said backsheet (22), pressure-sensitive adhesive (36) on said backsheet (22) for attachment in an undergarment having a crotch portion bounded on opposite sides by portions of curved leg openings, said functional enhancement indicator (34) providing a distinct visual emphasis to said first end region (12) of said urinary incontinence device,
wherein said incontinence pad comprises a longitudinal centerline and a transverse centerline perpendicular to said longitudinal centerline, and wherein said incontinence pad is asymmetrically-shaped about said transverse centerline, and wherein said incontinence pad comprises an absorbent core having a thickness of less than about 10 mm."

VIII. The opponent's arguments relevant to the present decision may be summarised as follows:

Fifth auxiliary request - Article 56 EPC

The subject-matter of claim 1 of the fifth auxiliary request did not involve an inventive step under Article 56 EPC.

Admittance of new inventive step attacks

The Board should take the inventive step objections starting from D6 in combination with common general knowledge and starting from D4 in combination with D2,

presented in the oral proceedings, into account. They had not been filed in writing since they would have been simply a repetition of what had already been previously stated.

D4 as starting point

D4 disclosed all the features of claim 1 with the exception of the feature that the functional enhancement indicator was chosen from the group consisting of printed marks, colored marks, and combinations thereof.

This feature provided no additional effect and constituted only an alternative way of providing a type of mark.

The skilled person would combine the teaching of D4 with the teaching of D2 since D4 aimed to avoid visual recognition by an observer of the presence of a pantiliner. When viewing the thong pantiliner in Figures 5 and 6 of D4, this also had a larger surface area on the left-hand side that corresponded to a target area.

D2, column 11, lines 45-47, taught also that the item concerned could be attached to the undergarment and thus worked in a way similar to the thong pantiliner of D4.

D2, column 14, lines 45-49, also disclosed that the target area could be made by a combination of printing and embossing, such that the skilled person faced with the teaching of D2 would add printed marks to the bonding locations 1 of the target area of D4 and arrive at the subject-matter of claim 1 without exercising an inventive activity.

IX. The patentee's arguments relevant to the present decision may be summarised as follows:

Fifth auxiliary request - Article 56 EPC

The subject-matter of claim 1 of auxiliary request 5 involved an inventive step under Article 56 EPC.

Admittance of new inventive step attacks

The opponent did not put forward any specific objections regarding the fifth auxiliary request during the written proceedings, such that any objection filed at the oral proceedings constituted an amendment to the opponent's appeal case not to be taken into account under Article 13(2) RPBA 2020. In addition, these objections relied on new facts, such as that D6 disclosed an incontinence pad.

D4 as starting point

D4 did not disclose a urinary incontinence pad nor a functional enhancement indicator chosen from the group consisting of printed marks, colored marks, and combinations thereof.

The feature "functional enhancement indicator is chosen from the group consisting of printed marks, colored marks, and combinations thereof" did not provide an additional effect and constituted only a different, alternative way of providing a type of mark.

However, D4 and D2 related to different types of articles. The bonding locations 1 in D4 bonded the topsheet to the underlying layer and could not be replaced by printed or colored marks.

In addition, D4 also taught that the articles were supposedly discrete, thus also teaching away from placing an additional indicator in the topsheet. The shape of D4 dispensed with the need to add an additional target for correct placement of the article such as the one disclosed in D2.

The skilled person therefore would not replace the bonding locations of D4 with printed or colored marks such as the ones of D2 (or add the latter to the former) in order to solve the problem posed without exercising an inventive step.

Reasons for the Decision

Fifth auxiliary request - Article 56 EPC

1. *Admittance of new inventive step attacks*
 - 1.1 During the oral proceedings, the opponent raised for the first time inventive step attacks starting from D6 in combination with common general knowledge and starting from D4 in combination with D2.
 - 1.2 According to Article 13(2) RPBA 2020, "[a]ny amendment to a party's appeal case made ... after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned".
 - 1.3 The opponent argued that these attacks were not filed before since they would have simply been a repetition

of what had already been argued with respect to foregoing requests.

- 1.4 The Board does not find this argument convincing. The fifth auxiliary request was filed with the reply to the opponent's statement of grounds of appeal on 17 August 2018 and the opponent did not submit any specific written objection in reply to it. The Board noted this in item 3.6 of its preliminary opinion.

Since the subject-matter of claim 1 of the fifth auxiliary request is not identical to claim 1 of any of the previous requests, the Board cannot identify any novelty or inventive step attack against a claim of any previous request filed by the opponent that would clearly and unambiguously be valid also for claim 1 of auxiliary request 5. The opponent has also not identified any. It is further noted that at least the inventive step attack starting from D6 relies on new facts e.g. that D6 disclosed an incontinence pad, as indeed included in claim 1 of the fifth auxiliary request, yet this has never been discussed before with respect to D6.

- 1.5 The Board finds that no exceptional circumstances justified by cogent reasons have been presented which justify the filing of new attacks regarding the fifth auxiliary request after the notification of the summons to oral proceedings.

- 1.6 However, the Board also noted in item 3.6 of its preliminary opinion that D4 did not seem to disclose a functional enhancement indicator chosen from the group consisting of printed marks, colored marks and combinations thereof but that D2 and D6 seemed to disclose this feature. The opponent had written that D2

and D6 disclosed this feature with regard to the second auxiliary request on page 5 of its reply to the proprietor's statement of grounds of appeal. The Board therefore had expressed doubts that such a change to an alternative type of mark in the article of D4 would involve an inventive step.

1.7 Accordingly, the Board used its discretion not to take the inventive step attack starting from D6 into account (Article 13(2) RPBA 2020). Since however the Board had already commented on this hypothetical objection in its preliminary opinion, it decided to consider the inventive step attack starting from D4 in combination with D2.

2. *D4 as starting point*

2.1 The embodiment of Figures 5 and 6 of D4 discloses:

"a feminine hygiene article [thong pantiliner 10] having a bodyfacing surface, a first end region [the wide end of the thong pantiliner 10 on the left of both Figures] and a second end region [the narrow end of the thong pantiliner 10 on the right side of Figures 5 and 6],

said feminine hygiene article [thong pantiliner 10] being for placement in an undergarment having a crotch portion bounded on opposite sides by portions of curved leg openings,

said feminine hygiene article [thong pantiliner 10] comprising at least one functional enhancement indicator [undulated lines of bonding locations 1] visible from said body-facing surface, said functional enhancement indicator [undulated lines of bonding locations 1] corresponding to at least one

functionally-enhanced portion of said feminine hygiene article,
wherein said functional enhancement indicator [undulated lines of bonding locations 1] is nearer said first end than said second end of said feminine hygiene article (10)
~~and wherein said functional enhancement indicator (34) is chosen from the group consisting of printed marks, colored marks, and combinations thereof,~~
wherein said article is a urinary incontinence pad having a shape defining an outer periphery, a topsheet [topsheet described in paragraph [0143]] joined about at least a portion of said outer periphery to a backsheet [backsheet described in paragraph [0147]] with an absorbent core [absorbing tissue core described paragraph [0145]] disposed between said topsheet and said backsheet, pressure-sensitive adhesive [panty fastening adhesive described in paragraph [0148]] on said backsheet for attachment in an undergarment having a crotch portion bounded on opposite sides by portions of curved leg openings,
said functional enhancement indicator [undulated lines of bonding locations 1] providing a distinct visual emphasis to said first end region [the wide end of the thong pantiliner 10 on the left of both Figures] of said urinary incontinence device,
wherein said incontinence pad comprises a longitudinal centerline and a transverse centerline perpendicular to said longitudinal centerline, and
wherein said incontinence pad is asymmetrically-shaped about said transverse centerline [the left end is wider than the right end in Figures 5 and 6], and
wherein said incontinence pad comprises an absorbent core having a thickness of less than about 10 mm ["less than 5mm" in paragraph [0107]].

- 2.2 The Board finds that bonding locations 1 as disclosed in paragraph [0024] and in Figure 6 of D4 correspond to a functional enhancement indicator providing a distinct visual emphasis to said first end region.
- 2.2.1 Figures 5 and 6 are schematic representations from which no specific dimensions can be obtained. The Board however finds that, to derive that there are more bonding points on the larger surface area end of the article of Figure 6 than on the smaller surface area end, specific dimensions are not required. Figure 6 shows a specific distribution of bonding locations, from which the skilled person derives that these are not homogeneously distributed, that the larger surface area end of the article has more bonding locations than the longitudinally opposite end and that these are concentrated in what could be described as at least two curved ("undulated" in paragraph [0054]) lines. These curved lines are therefore identifiable, localized and distinguishable as the functional enhancement indicator described in paragraphs [0035],[0036] and [0037] of the opposed patent and provide a distinct visual emphasis as defined in claim 1.
- 2.3 The Board also finds that the feminine hygiene article disclosed in Figures 5 and 6 is an incontinence pad, since such an article will without doubt absorb urine and thus fulfill the function of an incontinence pad at least for light incontinence.
- 2.4 Whilst paragraph [0014] of D4 refers to the background part of the disclosure and is not associated with any particular embodiment, the specific information regarding the absorption of bodily fluids is associated with "dark coloured absorbent articles according to this embodiment of the present invention" such that the

skilled person reading paragraph 14 would understand that the invention of D4 also masks all sorts of bodily fluids. The Board does not see how the article could be able to absorb only some bodily fluids and not others. D9, page 28 also seems to corroborate this idea by stating that "it is a common practice to use feminine hygiene products (sanitary napkins, pantliners) as light incontinence devices".

- 2.5 It was not disputed that the embodiment of Figures 5 and 6 of D4 did not disclose the differentiating feature "the functional enhancement indicator is chosen from the group consisting of printed marks, colored marks, and combinations thereof", since the bonding points 1 of D4 are not colored or printed marks. The Board also sees no reasons to conclude otherwise.
- 2.6 It was also not disputed that this sole differing feature failed to provide an additional effect and thus constituted only an alternative way of providing a type of mark.
- 2.7 As stated in item 3.6 of the preliminary opinion, both D2 and D6 disclose a functional enhancement indicator chosen from the group consisting of printed marks, colored marks and combinations thereof. D2, Figures 13a to 13j as well as column 14, line 22 to column 15, line 16, disclose a plurality of patterns on sanitary napkins, each building a target area 150 that corresponds to a functional enhancement indicator consisting of printed colored marks as defined in the claim under consideration.
- 2.8 However, D2 discloses a sanitary napkin with a totally different structure and shape. For example, the sanitary napkins according to D2 are not designed to be

primarily attached to the underwear and have a self-conforming shape for adjusting to the anatomy of the user (see, for example, D2, column 3, lines 11 to 18).

- 2.8.1 The opponent argued that D2, column 11, lines 45-47, also foresaw the possibility of the sanitary napkin being attached to the wearer's undergarment.

The Board agrees but notes that this is achieved through the provision of an additional "discrete adhesive member 82" and is disclosed as a non-ideal situation (see column 11, lines 59 to 63). As seen in Figure 3 and described in column 11, lines 43 to 58 such an adhesive is applied directly to the undergarment's facing side in a way that does not alter the structure and shape of the sanitary napkin of D2 thus not making it more similar to the one of D4.

- 2.8.2 Further, the patterns in D2, Figures 13a to 13j, serve as target areas to provide a correct placement of the pad by the typical user as disclosed in column 14, lines 34-38. On the other hand, the undulated bonding points in Figure 6 of D4 bond the topsheet to the underlying layer and provide an aesthetic effect, their correct placement already being assured by the shape of the thong pantiliner which approximately matches the contour of the crotch area of the underwear.

In addition, since the bonded pattern in D4 bonds the topsheet to the underlying layer, the skilled person would also not contemplate replacing the bonding locations with printed or colored marks and lose the attaching effect. Thus, although the larger area of D4 also comprises a target area as the opponent argued, the skilled person would not contemplate exchanging the

bonded portions by a colored or printed pattern such as the one of D2.

2.8.3 The opponent argued that D2 disclosed in column 14, lines 41 to 49, that it was possible to combine printing and embossing a pattern to serve as a target area and that D4 only taught that the absorbent article should not be visible other than to the wearer of the article, such that the skilled person would contemplate using further colored or printed marks as a target in addition to the bonded portions of D4.

2.9 However, the Board does not find these arguments convincing. As discussed above, the shape of the thong pantiliner of Figures 5 and 6 of D4 already ensures its correct placement and the undulating lines of bonding locations already indicate a functionally enhanced portion such that there would be no reason for the skilled person to add additional colored and/or printed marks to the thong pantiliner of D4.

Further, as stated for example in paragraph [0014], D4 teaches that discretion should be provided in use of the "entire" absorbent article and that to achieve this the colour of the topsheet should have an L Hunter value of less than 30 and be preferably of black colour. Contrary to the argument of the opponent, it is thus not exclusively the backsheet that should provide discretion.

2.10 For the reasons stated above, the skilled person would therefore neither replace the bonding locations of D4 with a printed or colored pattern, such as the one of D2, nor add the latter to the former in order to reach the subject-matter of claim 1 without the exercise of an inventive activity.

3. In the absence of any other admissible attacks, the Board thus concludes that the subject-matter of the sole claim of the fifth auxiliary requests involves an inventive step under Article 56 EPC and thereby that it meets the requirements of the EPC.
4. The Board avails itself of its power under Article 111(1) EPC to remit the case back to the opposition division for the description to be adapted to the amended claim.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the single claim of the fifth auxiliary request, a description to be adapted thereto and the figures of the patent specification.

The Registrar:

The Chairman:



D. Grundner

M. Hannam

Decision electronically authenticated